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Sovereign Immunity — A Statutory Approach To A Persistent Problem

I. INTRODUCTION.

After nearly a decade of drafting and debate,¹ congressional legislation defining the nature and extent of sovereign immunity to be accorded foreign nations in United States courts was passed in the closing days of the Ninety-Fourth Congress.² The Foreign Sovereign Immunity Act of 1976 (hereinafter FSIA) drastically alters the existing law on foreign sovereign immunity and has opened the way for extensive litigation involving civil plaintiffs and foreign states.³ Prior to the passage of the FSIA private plaintiffs were often foreclosed from asserting claims in contract and tort against foreign states by

¹ The literature concerning the appropriate extent of sovereign immunity to be accorded foreign states in the courts of the United States abounds; Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L. LAW 168 (1946); Panel, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. OF THE AM. SOC. OF INT'L. L. 182; Lowenfeld, *Claims against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U. REV. 901 (1969); Note, *The Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. INT'L. L.J. 487 (1974); Note, *Jurisdictional Immunities of Foreign States*, 23 DEPAUL L. REV. 1225 (1974); Note, *Sovereign Immunity — Proposed Statutory Elimination of the State Department's Role — S.566 93d Cong., 1st Sess. (1973)*, 15 HARV. J. INT'L. L. 157 (1974) Lowenfeld, *Litigating a Sovereign Immunity Claim — The Haiti Case*, 49 N.Y.U. L. REV. 377 (1974).

² Pub. L. No. 94-583, H.R. 94-1487 94th Cong., 2d Sess. (1975) (codified at 28 U.S.C. § 1602 *et seq.* (1976)). The bill was originally introduced in January, 1973, as S.566 and H.R. 3493.

³ 28 U.S.C. §§ 1605-1608 (1976).

pleas of sovereign immunity. The plea of sovereign immunity, when supported by the appropriate suggestion of immunity from the State Department, deprived the particular state or federal court of its otherwise proper jurisdiction.⁴

A. *Historical Background*

From its earliest formulation in American law, the doctrine of foreign sovereign immunity has been inextricably linked to policy considerations. The convergence of the legal and political was writ large in *Schooner Exchange v. McFadden*.⁵ In that case, the United States Supreme Court, speaking through Chief Justice Marshall, held that vessels of a foreign state were immune from suit in U.S. courts. While frequently cited as the earliest statement of the American law of sovereign immunity, the opinion's further significance is that it anticipates the whole range of issues presented by modern state trading enterprises and the extent to which immunity should be granted to states that are engaged in ostensibly commercial activities. Chief Justice Marshall's opinion expressed certain misgivings as to expanding the scope of immunity to other acts performed by sovereign states. Referring to essentially private or commercial activities Marshall stated that:

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and the military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to

⁴ See Procedures for obtaining suggestions from the State Department and their submission by the Attorney General via the United States Attorney. Note, *The Relationship between the Executive and Judiciary: The State Department as Supreme Court of International Law*, 53 MINN. L. REV. 389 (1968).

⁵ 11 U.S. (7 Cranch) 116 (1812), Attorney General Pinkney's argument preceding Chief Justice Marshall's opinion presents an extreme notion of the plenary power of the executive branch in determinations of sovereign immunity.

do with respect to any portion of that armed force, which upholds his crown, and the nation is entrusted to govern.⁶

Marshall's doubts notwithstanding, American cases have extended the grant of immunity from warships to other state-owned vessels and by implication to other types of property as well.⁷

As the doctrine of sovereign immunity developed in subsequent case law, foreign states seemed to enjoy an expanding measure of exemption from the judicial process of U.S. courts. Predictably, the so-called absolute theory of sovereign immunity came under increasing attack from disgruntled plaintiffs whose otherwise valid claims were never heard on their merits because of a rigid view of sovereign immunity. With the proliferation of transnational business enterprises in the early part of this century, private business interests became increasingly involved in what amounted to essentially commercial transactions with foreign governments. Gradually, the so-called "restrictive theory" of sovereign immunity began to emerge, whereby courts would distinguish between the private and public acts of a foreign sovereign. Under this restrictive view, public acts (*jure imperii*) were accorded full immunity whereas private or commercial acts (*jure gestionis*) were examined on the merits by a court of appropriate jurisdiction.⁸

In 1952 the State Department announced by way of the Tate Letter⁹ that it would abandon the theory of absolute immunity

⁶ *Id.* at 145.

⁷ *Oliver American Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924); *Berizzi Bros. v. S. S. Pesaro*, 271 U.S. 562 (1926); *Compania Espanola v. The Navemar*, 303 U.S. 68 (1938); *Ex Parte Peru*, 318 U.S. 578, (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1943), *Oster v. Dominion of Canada*, 144 F.Supp. 946 (N.D.N.Y.), *aff'd*, 238 F.2d 400 (2d Cir. 1956), *cert. den.* 353 U.S. 936 (1957); *Purdy v. Argentina*, 333 F.2d (7th Cir. 1964) *cert. den.*, 379 U.S. 962 (1965); *Spacil v. Crowe*, 489 F.2d 614 (2d Cir. 1974); *Aerotrade, Inc. v. Republic of Haiti*, 376 F.Supp. 1281 (S.D.N.Y. 1974).

⁸ See W. Bishop, *International Law* at 660-677 (3d ed. 1971).

⁹ The Tate Letter was a communication from the acting legal adviser of the State Department, Jack B. Tate to the acting Attorney General published in the Department of State Bulletin. 26 Dept. State Bull. 984 (1952). See, Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L. L. 93 (1953).

and adopt a less liberal view. The Department indicated that it would support immunity of a foreign sovereign with regard to public acts but not with respect to private acts. The Tate Letter itself, however, offered no express criteria for distinguishing between public and private acts in applying the sovereign immunity doctrine in specific cases.¹⁰

The unstated assumption contained in the Tate Letter was that once the State Department indicated its position, dictated in large measure by policy considerations, the courts would make appropriate responses in cases where private plaintiffs sued foreign states on essentially commercial claims. While executive policy could not *control* the courts, there had been considerable judicial reluctance to grant requests for immunity where the State Department had declined to support the claim.¹¹ In fact, there was strong authority indicating that the Federal Judiciary feels bound to follow the views of the Executive Branch on the grounds that it is that branch of the government which is charged with the conduct of foreign relations.¹² As a practical matter, the United States Supreme Court had reasoned that in sovereign immunity cases a judicial rejection of a State Department suggestion of immunity could have embarrassing consequences for the conduct of American foreign policy. It was largely this reliance by the judiciary on State Department determinations of immunity which gave rise to

¹⁰ 26 DEPT. STATE BULL. 984 (1952).

¹¹ The majority of courts before and since the Tate Letter have felt obliged to follow executive suggestions. The Court in *Ex Parte Peru* 318 U.S. 578 (1943) regarded an expression of State Department works as a "conclusive determination". In any case, executive suggestions have been accorded substantial weight by the courts. See *Rich v. Naviera Vacuba S.A.*, 197 F.Supp. 710 (E.D. Va. 1961) *aff'd*, 295 F.2d 24 (4th Cir. 1961), *Spacil v. Crowe*, 489 F.2d 614 (2d Cir. 1974).

Practice has varied, however, where either plaintiffs have not sought a suggestion of immunity or where it was sought and denied or no action was taken by the Department. In *Petrol Shipping Corp. v. Kingdom of Greece*, 326 F.2d 117 (2d Cir. 1964), rehearing 332 F.2d 370 (1964), 360 F.2d 103, (2d Cir. 1966) the court initially accepted a plea of sovereign immunity by the Greek ambassador, then vacated directing further inquiry into grounds for immunity. The plea was finally denied on the ground that the State Department has not requested immunity. *Per contra*, *Aerotrade v. Republic of Haiti*, 376 F.Supp. 1281 (S.D. N.Y. 1974) in which immunity was granted in the absence of a State Department suggestion of immunity.

¹² *Ex Parte Peru* 318 U.S. 578 (1943); *Mexico v. Hoffman*, 324 U.S. 30 (1943).

complaints of "judicial abdication"¹³ and the intense lobbying efforts by disgruntled plaintiffs for a change in this area of law.

B. *The FSIA and the Law of Sovereign Immunity*

While the FSIA took four years of preparation,¹⁴ it appears that the State Department had anticipated some statutory reform of the then current procedure since 1964.¹⁵ The bill, when originally introduced, was supported by the Departments of State and Justice¹⁶ and has received continued endorsement from both departments.¹⁷ The central premise of the bill, "that decisions on claims by foreign states to sovereign immunity are best made by the judiciary"¹⁸ is set out in section 1602 of the Act. In effect, the legislation directs the Federal District Courts to entertain suits initiated by private parties against foreign states, the affirmative defense of sovereign immunity notwithstanding, if the transaction giving rise to the suit is essentially commercial in nature¹⁹ and is carried on in the United States.²⁰ However, the act further provides that immunity will be denied in circumstances where the transaction is "an act outside the territory of the United States in connection with a commercial activity of the foreign state else-

¹³ Jessup, *Has the Supreme Court Abdicated one of its Functions*, 40 AM. J. INT'L L. 168 (1946).

¹⁴ A forerunner of FSIA was first introduced by Senators Roman Hruska and Hugh Scott as S.566 in January, 1973. See, introductory remarks of Senator Hruska, 119 CONG. REC. S1297, S1298 (Jan. 26, 1973).

¹⁵ See Summary of the Proceedings of the Ad Hoc Panel on Sovereign Immunity of the American Society of International Law Meeting in Washington, D.C., April 3, 1973.

¹⁶ The bill in its original form as S.566 was introduced in the Senate on behalf of the Departments of State and Justice and is appended to a letter from Attorney General Kleindienst and Secretary of State William P. Rogers to the President of the Senate, dated Jan. 22, 1973, 119 CONG. REC. 1299 Reproduced at 12 INT'L L&G. MATS. 118 (1973).

¹⁷ H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-11 (1976).

¹⁸ *Id.* at 14.

¹⁹ 28 U.S.C. § 1603(d) provides a definition of "commercial activity" for the purpose of the statute.

²⁰ 28 U.S.C., § 1605(a)(2).

where and that act causes a direct effect in the United States.”²¹ This provision appears to extend U.S. jurisdiction to a foreign government’s commercial activities which, while carried on in some other foreign state, somehow impacts upon the U.S. Just how expansively this notion of direct effect jurisdiction will be applied by the courts remains to be seen. However, the direct effect notion of jurisdiction has previously been utilized by American courts in anti-trust litigation where restrictive trade practices carried on abroad had a direct effect on the United States.²² The implications of this facet of extraterritoriality will be discussed below.

Another stated purpose of the FSIA is to provide a statutory scheme which “incorporates standards recognized under international law.”²³ Regrettably, this assertion is less than accurate. While the drafters of the bill may have aspired to codifying existing international law, the fact remains that there is considerable disagreement as to when and to what degree sovereign immunity should be accorded to states engaged in activities having characteristics of both *jure imperii* and *jure gestionis*.²⁴ While the long-term trend appears to be in the direction of the restrictive theory,²⁵ just when such limited

²¹ *Id.*

²² See Text at notes 126-131.

²³ H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7 (1976). It might be assumed here that the drafters of the bill were seeking to codify existing practice of states in the area of sovereign immunity — no small task. See the declaration of purpose in the beginning of the House Report, “First, the bill would codify the so-called ‘restrictive’ principle of sovereign immunity, as presently recognized in international law.”

²⁴ Until recently the British continued to adhere to a virtual absolute theory of sovereign immunity. See *Phillipine Admiralty v. Wallem Shipping Ltd.* (1976) 1 All.E.R. 78.

²⁵ An early manifestation of the so-called restrictive theory is found in Mr. Justice Marshall’s opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), *supra*, fn. 6. In 1926, representatives of twenty nations, including all the major powers except the United States and the Soviet Union signed a convention limiting sovereign immunity in the area of maritime commerce. International Convention for the Unification of Certain Rules Concerning the Immunities of State Ships. Translated to English, Allen, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS*, 303-308 (1933) (hereinafter the Brussels Convention). The most recent attempt to deal with the sovereign immunity question is the Council of Europe’s European Convention on State Immunity, 11 INT’L. LEG. MATS 470 (1972).

immunity will obtain remains unclear.²⁶ One commentator in discussing the restrictive theory has stated:

According to this view the most that can be said of sovereign immunity is that the foreign sovereign may arrest suit or resist execution only in respect of governmental activity or property. It is usually put in the form that immunity covers acts *jure imperii* and not acts *jure gestionis*. At bottom the distinction reflects the municipal law division into public law and private law, but as each municipal system makes the division on somewhat arbitrary premises the distinction in international law may well prove to be elusive. There are no universally accepted canons for the characterization of activity. In some systems the canon is a constitutional one, in others it is theoretical. In the result one system might regard the running of a railway as a public law function, while another may regard it as a private law one. A United States court held that a contract for the purchase of army boots was a sovereign act, an Italian held it was not. The problem is to decide whether the characterization is to be made according to the law.²⁷

It is precisely this lack of an internationally accepted standard of sovereign immunity which is glossed over by the statement of purpose in section 1062 of the new act.²⁸ Moreover, there are profound analytical problems with the *jure imperii*, *jure gestionis* distinction. It has been aptly pointed out that such distinctions are logically inconsistent because they involve an

See Comment, *Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity*, 12 COLUM. J. TRANSNAT'L. L. 130 (1973).

²⁶ See Mann, *New Developments in the Law on Sovereign Immunity*, 36 MOD. L. REV. 18 (1973).

²⁷ O'Connell, *INTERNATIONAL LAW* 917 (2d ed. 1970).

²⁸ The lack of a uniform standard was underscored in *THE PORTO ALEXANDRE* (1920) p. 30. However, there were some indications that *THE PORTO ALEXANDRE* mistakenly applied the principles laid down in an earlier English case *THE PARLEMENT BELGE* (1880) 5 P.D. 197. That case had left open the questions as to whether "mere trading ships" would be accorded the same degree of immunity granted to the *Palement Belge*, a Belgian mail boat involved in a collision with a British vessel. For other British Cases adhering to a more liberal grant of immunity see *RAHIMTOALA V. H. E. H. THE NIZAM OF HYDERABAD* (1958) A.C. 379 and *THAI-EUROPE TAPIOCA SERVICE LTD. V. GOVERNMENT OF PAKISTAN* (1975) 3 All E.R. 961; However, it appears that courts in the United Kingdom are moving toward the restrictive theory of sovereign immunity. See *TRENDTEX TRADING LTD. V. CENTRAL BANK OF NIGERIA* (1977) 2WLR 356.

a priori assumption as to the proper function of governments. While *acta jure imperii* were readily distinguishable from *acta jure gestionis* according to European laissez-faire theories of the nineteenth century, such distinctions appear elusive today in a world community which is divided into modified capitalist, mixed and variations on socialist economies.²⁹

The doctrine of sovereign immunity is, as its name implies, inextricably bound up on the notion of sovereignty of states. The chief argument on behalf of the doctrine is that the principles of independence, dignity and equality of states precludes courts of one state from exercising jurisdiction over a foreign government. To do so, it is argued, would amount to an impermissible exercise of *imperium* in disregard of the fundamental canons of international law. While there has been considerable erosion of the principle of absolute immunity, as noted above, analytical problems continue with the restrictive theory insofar as it impinges upon the sovereignty of states.

As already discussed, the long term trend from the 1926 Brussels Convention to the most recent pronouncement of the Council of Europe on State Immunity³⁰ has been towards permitting the courts of one state to adjudicate claims of aggrieved private parties against foreign states by applying the restrictive theory of immunity. But the states adhering to the restrictive view have tended to be developed Western States.³¹ These states tend to view the *jure imperii*, *jure gestionis* distinction in more traditional terms. Distinctions between the private and public sectors are more acute in the West and generally public welfare programs notwithstanding governments are not viewed as acting in their public or sovereign capacities when engaged in any form of commercial activity. But even in the West numerous activities which might be considered as appropriately within the private sector — railways,

²⁹ Brierly, *THE LAW OF NATIONS* (6th ed. 1963) p. 250. See Lauterpacht, *THE PROBLEM OF JURISDICTIONAL IMMUNITIES OF FOREIGN STATES*, 28 *BR. YB. OF INT'L. L.* 220, 226 (1951).

³⁰ See note 25, *supra*.

³¹ *Ibid.*

airlines, telephone, telegraph and utilities — are now run by the government in most European states. In general, the folklore of Benthamite private enterprise and free trade, more than any other factor, prevents many states, particularly the U.S., from seeing to what extent government regulation and initiative has preempted the field in many areas. Post-war nationalizations in the United Kingdom led to public ownership of many basic industries, including the mines. In the United States, government owned corporations, such as the Tennessee Valley Authority and Bonneville Power Commission, have been established despite widespread prejudice against the very notion of public enterprise.

In addition to socialist economies, most developing nations eschew the traditional view of state in economic organization. Recent assertions by the newer developing states, the United Nations Resolution on Permanent Sovereignty over Natural Resources³² and the New International Economic Order³³ express a sharpened view of state sovereignty, one not wholly dissimilar from the absolute sovereign immunity rationale. Developing states argue that since they have permanent sovereignty over their natural resources, any concession contract or agreement with developed states or their corporations bows before this broad assertion of sovereignty. Thus where a developing country contracts with a mineral extraction company to permit extraction of mineral resources these agreements exist in large measure against the backdrop of absolute sovereignty. By analogy, this situation resembles the relationship which existed between private litigants and foreign governments prior to the advent of the restrictive theory. Thus, while European states and the United States may view domestic adjudication of commercial or tort claims against other governments as desirable, numerous other states would perceive this as an intolerable interference with their sovereignty. Moreover, the developing states see the role of their central govern-

³² U.N.G.A. Res. 3171 (XXVIII) of 17 December 1973.

³³ U.N.G.A. Res. 3202 (S-VI) of 16 May 1974.

ments as sharply instrumentalist in the area of economic organization.

Viewed another way, the U.S. and other states adopting similar notions of the appropriate relationship between government and commerce, have done so for reasons of policy and tradition unique to each country. But profound doubts arise as to whether the U.S. and states similarly situated ought to *autointerpret* the proper relationship between public and private sectors for other states in varying stages of economic and political development. Furthermore, by calling upon U.S. domestic courts to give judicial force to our views to the detriment of other states it is quite conceivable that international claims will ensue on a state-to-state level. The result of all of this is an elevation of what the U.S. regards as mere commercial disputes to the level of high politics. One is left with profound doubts as to whether this is consistent with the United States' view of the role of law or the harmonization of the horizontal relationships among states.

In short, international law provides little in the way of generally accepted parameters of sovereign immunity. While many states adhere to the restrictive view, numerous states take a contrary position. Section 1602 of the FSIA represents more of an assertion of the restrictive view of sovereign immunity, currently popular in western Europe and the U.S., rather than a broad consensus as to the law. This seems inconsistent with certain fundamental values that are clearly within universal concepts of the international legal order. Not the least of these is the fundamental notion of sovereign equality and the implied power of each state to determine its own economic organization.

Apart from the international law considerations, there are several constitutional questions posed by the passage of congressional legislation which impinges upon an area of executive power and discretion previously recognized by the Judicial Branch as properly within the ambit of executive authority.

On balance, the FSIA of 1976 represents an attempt by Congress to bring order to the problem of sovereign immunity.

This article will examine the new law as it affects previous U.S. law, the current practice of states regarding sovereign immunity, and the potential separation of powers difficulties presented by the new bill.

II. THE FOREIGN SOVEREIGN IMMUNITY ACT AND ITS EFFECT ON U.S. DOMESTIC PRACTICE

A. *The Prior Law*

The FSIA provides a detailed statutory scheme by which foreign states will be presumed immune from suit subject to specified exceptions. Sections 1603-1605 provide the definitional references for the main body of the Act. Therein Congress has provided a legislative standard for judicial determinations of when and under what circumstances immunity from suit will inhere in the actions of foreign states.

In effect, Congress has gone substantially further in articulating the desire of the United States to adhere to a restrictive theory of sovereign immunity than the Department of State had gone in 1952. To recapitulate, the Department made it clear *via* the Tate Letter that its policy was to decline immunity to friendly foreign states in suits arising out of essentially commercial activity. The chief problem with the Tate Letter was the obvious lack of legal standards with which to distinguish between a sovereign's public and private acts. Moreover, the Tate Letter provided no clear cut indication as to when legal standards were to give way to policy determinations made by the Department of State.

State and federal courts struggled to find some workable standard for judicial determinations of immunity following the Department of State's endorsement of the restrictive immunity. *Victory Transport Inc. v. Comisaria General*⁸⁴ illustrates many of the problems confronting the courts in their attempts to bring order to an area of the law marked by uncertainty and inconsistency. In *Victory Transport*, an American shipping company sued an instrumentality of the Spanish Gov-

⁸⁴ 336 F.2d 354 (1964).

ernment to compel arbitration of a claim for damages allegedly sustained by one of plaintiff's vessels while unloading grain in a Spanish port.³⁵ There, the Court of Appeals for the Second Circuit attempted to impose workable contours on the vagaries of the Tate Letter by holding that a claim of sovereign immunity would not stand where the suit arose out of purely commercial transaction. Speaking for the court, Judge Smith stated:

Since the State Department's failure or refusal to suggest immunity is significant, we are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive. Such acts are generally limited to the following categories:

- (1) internal administrative acts, such as nationalization;
- (2) legislative acts, such as nationalization;
- (3) acts concerning the armed forces;
- (4) acts concerning diplomatic activity; and,
- (5) public loans.

The Comisaira General's chartering of the appellee's ship to transport a purchase of wheat is not a strictly public or political act. Indeed, it partakes far more of the character of a private commercial act than a public or political act.³⁶

But, while the Second Circuit tried to flesh out some standard for distinguishing between acts *jure imperii* and *jure gestionis*, no readily applicable judicial standard was defined. Indeed, just what "Act[s] concerning the armed forces" should be entitled to sovereign immunity remained an unsettled question after *Victory Transport*.³⁷

In *Aerotrade Inc. v. Republic of Haiti*³⁸ a foreign governmental agency purchasing military equipment, some of which was used for nonmilitary purposes, was held to be entitled to

³⁵ The charter party contained the New York Procedure Arbitration clause. When the Spanish government refused to arbitrate, suit was brought in the federal district court for the Southern District of New York to compel arbitration under the United States Arbitration Act, 9 U.S.C. § 4 (1947).

³⁶ Note 34, *supra*.

³⁷ *Id.*

³⁸ 376 F.Supp. 1281 (S.D.N.Y. 1974).

immunity from suit, notwithstanding the fact that the Haitian government had not sought a suggestion of immunity from the State Department. Thus, while the court in *Victory Transport* purported to lay down guidelines for determining when immunity should be appropriately granted, the lack of definitional clarity of terms like "acts concerning the armed forces" did not admit of a precise judicial precedent for subsequent immunity cases.

Prior to *Victory Transport*, other U.S. decisions dealing with the question of sovereign immunity displayed marked inconsistency in their results. In *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*³⁹ an agency of the Turkish government was engaged in purchasing meat for the Turkish Army. The plaintiff in that case, an American provisions supplier alleged a breach in the procurement contract between itself and the Turkish purchasing agents. While it was shown that the bulk of the purchases were intended for the Turkish army, the court reasoned that the act of purchasing meat did not serve traditional purposes of government and was not entitled to immunity. But, to illustrate the divergent views existing even within the same circuit, an earlier case involving a similar fact situation, the purchase of shoes for a foreign army, held that such purchases were sovereign acts worth of immunity from suit.⁴⁰ Suffice it to say that, in spite of numerous attempts by the judiciary to come to grips with the problem of separating commercial from governmental activities, considerable uncertainty remained.

The FSIA, on the other hand, specifically denies immunity where there is "a contract by a foreign government to buy provisions or equipment for its armed forces."⁴¹ This amounts to a legislative reversal of the result in *Aerotrade Inc. v. Republic of Haiti*⁴² where the court had followed the reasoning in

³⁹ 25 Misc. 2d 299, 204 N.Y.S. 3d 971 (Sup. Ct. 1960), *aff'd*, 17 App. Div. 2d 927, 233 N.Y.S. 2d 1013 (1962).

⁴⁰ *Kingdom of Romania v. Guarantee Trust Co.*, 250 F.341 (2d Cir.), *cert. den.*, 246 U.S. 633 (1918).

⁴¹ H.R. Rep. No. 1487 94th Cong. 2d Sess. 16 (1976).

⁴² Note 38, *supra*.

*Victory Transport v. Comisaria General*⁴³ thereby dismissing plaintiff's complaint on the ground that "the contract upon this suit is based and the goods sold thereunder involved equipment for the armed services of Haiti."⁴⁴

The issue of whether government procurement contracts should be accorded immunity runs to the core of the debate over which are acts *jure imperii*, and which are acts *jure gestionis*. On its face, the acquisition of arms for defense programs appears to be a quintessentially sovereign act. However, section 1603 of the act adopts the commercial nature of the transaction as the exclusive test of governmental liability,⁴⁵ thus cutting across fundamental notions of sovereignty and sovereign equality.

In effect, the courts are bound to deny immunity to a foreign government in any suits involving procurement contracts regardless of the extent to which such a denial might adversely affect a foreign government's defense posture. Thus, if one can imagine a continuum of governmental interests ranging at one extreme from purchase of shoes for the army to a purchase of vital defense weaponry and components on the other, the U.S. District Courts are bound to entertain suit regardless of the potentially adverse consequences for a foreign state's vital interests or American foreign policy. This fact, coupled with the exclusion of the Executive Branch from the decision-making process, places the judiciary in the position of being bound by congressional directive with respect to how pleas of immunity shall be treated while effectively depriving them of an essential judicial power to evaluate such cases on their merits. The Courts may find themselves bound to deny pleas of sovereign immunity in cases where a foreign state is exercising indisputably sovereign powers in acquiring military equipment simply because it involved a commercial transaction. In effect, the Federal Judiciary would be precluded from taking into account the views of the Department of State, previously regarded as all

⁴³ Note 34, *supra*.

⁴⁴ 376 F.Supp. 1281, 1284 (S.D.N.Y. 1974).

⁴⁵ 28 U.S.C. §§ 1602, 1603, 1605(a)(2).

but dispositive. The possible separation of powers difficulties posed by the FSIA will be dealt with in section three of this paper but are raised here to illustrate the extent to which the new legislation impacts upon the past practices of the courts in this critical area.

B. *Circumstances Under Which Immunity Will Be Denied*

The FSIA begins by creating the presumption that "a foreign state shall be immune from the jurisdiction of the courts of the United States."⁴⁶ Section 1605 of the bill depicts certain circumstances where commercial acts of foreign states will overcome the presumption of immunity of the preceding section so as to establish jurisdiction in the Federal District Courts. Previously, no specific presumption of immunity existed, rather, states being sued by private plaintiffs simply pleaded sovereign immunity, relying on a public purpose of the transaction theory, or on one of the categories set out in *Victory Transport v. Commisaria General*.⁴⁷ However, executive suggestions of immunity were, for all intents and purposes, conclusive.

One of the various exceptions to the presumptive immunity is where a court finds an implied or express waiver of immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty or by contract with a private party.⁴⁸ Regarding implicit waivers, the section-by-section analysis provides that such waivers may be found in cases where a foreign state has consented to arbitration or has agreed that the law of a certain country should govern.⁴⁹ Withdrawal of such waivers will not be effective.⁵⁰ The use of a waiver theory in the area of sovereign immunity is not novel. The United States Supreme Court has held that where a foreign state or agency itself has instituted suit that this amounts to an implied waiver of immunity at least up to the amount of any counterclaims.⁵¹ How-

⁴⁶ 28 U.S.C. § 1604.

⁴⁷ Note 34, *supra*.

⁴⁸ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 18 (1976).

⁴⁹ *Id.*

⁵⁰ 28 U.S.C. § 1605(1).

⁵¹ *National City Bank of New York v. Republic of China*, 348 U.S. 356 (1955).

ever, the final phrase in section 1605(1), "notwithstanding any withdrawal of waiver" would presumably overrule cases which have held that a waiver of immunity in a contract could subsequently be withdrawn after the cause of action arose.⁵²

The main thrust of the new act is directed toward eliminating pleas of sovereign immunity where states are engaged in essentially commercial activities without regard to a state's contention that such acts have a public purpose.

Section 1605 (a) (2) of the FSIA elaborates the occasions when the commercial nature of a state's activities will overcome the presumption of immunity. In effect, this provision denies immunity to foreign states in cases "in which the action is based upon a commercial activity carried on in the United States."⁵³ This section harkens back to the definitions contained in section 1603(d) and further states exceptions to state immunity in two additional circumstances. First, where there is "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."⁵⁴ An example of such activity would be the issuing of securities in the United States that violates U.S. securities laws or regulations,⁵⁵ where the issue itself relates to a commercial activity abroad. A second set of circumstances leading to a denial of immunity is in cases where "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."⁵⁶ This provision further stresses the reasoning underlying section 1603(e) that is, where there are substantial contacts between the transaction giving rise to the cause of action and territory of the United States, a court may appro-

⁵² See the analysis of § 1605, H.R. Rep. No. 1487, 94th Cong. 2d Sess. 18 (1976). In *Rich v. Naviera Vacuba, S.A.*, (E.D. Va. 1961), *aff'd. per curiam* 295 F.2d 24 (4th Cir. 1961), the court, while not passing specifically on the permissibility of withdrawal of waiver indicated that subsequent withdrawal might be effective. That case turned on the fact of executive intervention and suggestion of immunity.

⁵³ 28 U.S.C. § 1605(a)(2).

⁵⁴ *Id.*

⁵⁵ H.R. Rep. No. 1487 94th Cong. 2d Sess. 19 (1976).

⁵⁶ *Id.*

propriately exercise jurisdiction. By relying on a substantial contact and direct effect rationale the act creates a rule of extraterritorial jurisdiction to be applied by American courts in cases where foreign sovereigns have engaged in commercial conduct which impacts upon the United States. Previously, the "direct effect" theory of jurisdiction extended primarily to antitrust litigation where the actions complained of technically took place outside the territory of the United States.⁵⁷

This section of the Act poses several questions as to what extent foreigners acting outside of the territory of the United States will be subject to U.S. courts' jurisdiction to prescribe. Furthermore, it remains unclear as to how far removed from direct contact with the United States an activity must be to escape the sanctions of this provision. Unavoidably, there will be some circumstances where the exercise of U.S. jurisdiction to prescribe and enforce will be viewed by other states as an impermissible interference with their sovereignty. Even in the area of applying U.S. antitrust law to acts of foreigners abroad, the notion of extraterritorial jurisdiction has not received widespread acceptance from other states.⁵⁸ The potential for conflict in this area, which will be discussed below,⁵⁹ is enormous.

The new act also denies immunity from suit in cases where "rights in property taken in violation of international law"⁶⁰ are involved. This section provides two categories where immunity will be denied: "where the property in question or any

⁵⁷ The section by section analysis states that "neither the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant." Thus, the bill does not affect the holdings in such cases as *United States v. Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913), or *Pacific Seafarers, Inc. v. Pacific Far East Lines, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), *cert. den.*, 393 U.S. 1093 (1969). For an analysis of the effect of the Foreign Sovereign Immunity Act on antitrust litigation, see Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEXAS L. REV. 1 (1976).

⁵⁸ See generally, H. Steiner & D. Vagts, *Materials on Transnational Legal Problems* (2d ed. 1976).

⁵⁹ See discussion in text accompanying notes 146 to 150.

⁶⁰ 28 U.S.C. § 1605(a)(3).

property exchanged for such property is present the United States; or where the property in question or property exchanged for it is owned by an agency or instrumentality of a foreign government and that agency is engaged in essentially commercial activities.”⁶¹ The section-by-section analysis indicates that the term “taken in violation of international law” means any nationalization or expropriatory taking by a foreign government of property without payment of prompt, adequate and effective compensation.

This provision is consistent with American practice since the legislative reversal of *Banco National de Cuba v. Sabbatino*⁶² in the Hickenlooper Amendment to the Foreign Assistant Act of 1964.⁶³ In that amendment, Congress informed the courts that the act of state doctrine would no longer operate to preclude an inquiry on the merits of any claims against title to expropriated property which finds its way into the United States. If the property were taken in violation of principles of international law, including the precepts of prompt, adequate and effective compensation, the courts were directed to make an on-the-merits determination of any conflicting claims of title to the property at issue.

⁶¹ *Id.*

⁶² 376 U.S. 398 (1964).

⁶³ 22 U.S.C. § 2370(e)(2):

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of international law, including the principles of compensation and the other standards set out in this subsection: Provided, that this subparagraph shall not be applicable (1) in any case in which an act of foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

Without plumbing the depths of the distinction between the act of state doctrine and sovereign immunity, it should be noted that the two concepts are not identical. Essentially, the substantive defense of sovereign immunity accords the defendant exemption from suit by virtue of status. The act of state doctrine exempts no one from suit, but rather, tells the court what law to apply. It concerns the limits for determining an otherwise applicable rule of law. Although both the act of state doctrine and the sovereign immunity theory have been used to reach largely the same result, *i.e.*, remove the acts of a foreign sovereign from the scrutiny of U.S. domestic courts, they should not be confused or used interchangeably. The act of state doctrine is a choice of laws theory by which a court determines precisely what law should be applied. If a court finds that the applicable law is that of the foreign state involved in the litigation before it, and that law is valid within the foreign state further judicial inquiry ceases. Sovereign immunity, when successfully pleaded, halts the judicial proceeding at an earlier stage than the act of state theory. A foreign sovereign state is exempt from judicial process by reason of its status alone no inquiry of applicable law is made. Once a satisfactory showing of the defendant state's status is made, suit is dismissed.

The distinction between the two theories is frequently overlooked. Most recently the United States Supreme Court in *Alfred Dunhill Ltd. v. Republic of Cuba*⁶⁴ further confounded the matter by holding that the act of state doctrine did not apply to the commercial acts of a sovereign government. The plurality opinion in *Dunhill* made frequent reference to the Tate Letter and numerous cases dealing with sovereign immunity.

For purposes of this paper it is enough to appreciate the similarity in purpose between the Hickenlooper Amendment and the FSIA. In the earlier enactment, Congress was imposing on American courts rules of decision concerning the act of state doctrine and applicable principles of international law.

⁶⁴ 96 S.Ct. 1854 (1976), 44 U.S.L.W. 4665 No. 73-1288.

This is essentially the same approach taken by Congress in the FSIA. Where property has been nationalized or expropriated without payment of compensation the defense of sovereign immunity will not be available. Here, as in the Hickenlooper Amendment, Congress has made a decision as to what is required by international law. While Congress has asserted that the above standards regarding compensation are demanded by international law, courts have, in the past, determined for themselves what is mandated by international law by reference to the cases before them.⁶⁵ The constitutional implications and the impact of this legislative judgment on international law will be discussed below.⁶⁶

The remaining exceptions to immunity created by the new act relate to rights in immovable or gift property,⁶⁷ suits in tort⁶⁸ and admiralty.⁶⁹ Section 1605(a)(4) "denies immunity in litigation relating to rights in real estate and in inherited or gift property located within the United States."⁷⁰ This provision is consistent with that section of the Tate Letter which stated that immunity would not be granted in actions relating to real property, with the exception of diplomatic and consular property.⁷¹

A foreign state is also denied immunity in actions "in which money damages are sought against a foreign state for personal injury or death, or damages for loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state"⁷² While this provision specifies that the tort must have occurred within the U.S., it is not restricted to commercial torts. The purpose of section 1605(a)(5) is to permit

⁶⁵ Henkin, *Act of State: Sabbatino in the Court and Congress*, 3 COL. J. TRANS-NAT'L. L. 99 (1965).

⁶⁶ See discussion in text accompanying notes 208-211.

⁶⁷ 28 U.S.C. § 1605(a)(4) (1976).

⁶⁸ 28 U.S.C. § 1605(a)(5) (1976).

⁶⁹ 28 U.S.C. § 1605(b)(1) (1976).

⁷⁰ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 20 (1976).

⁷¹ 26 Dept. of State Bull. 984 (1952).

⁷² 28 U.S.C. § 1605(a)(5). The language in this paragraph closely resembles that which is used in the Federal Torts Claims Act. 28 U.S.C. § 1346(b) (1948).

victims of a traffic accident, for example, to maintain a suit in tort against a foreign state.⁷³

This provision closely parallels existing U.S. domestic practice regarding tort claims against the United States government. The Federal Torts Claims Act⁷⁴ permits private plaintiffs to maintain an action against the federal government for allegedly tortious behavior of a government agent or employee. However, it should be noted that under the Federal Torts Claims Act the United States has consented to suits in its *own courts* and has not given a blanket consent to be sued for tortious conduct of its officials or agents in the courts of a foreign sovereign. The federal government has created an elaborate judicial system to hear such claims against it in the Court of Claims.⁷⁵ In addition, the U.S. has carefully excluded certain forms of action from the overall consent to suit. Moreover, the U.S. limits liability with respect to activities of military and naval forces and in no event does the federal government permit execution of judgments. It should also be noted that with the exception of specific agreements such as the NATO Status of Forces Agreement, the United States has not waived immunity for the actions of its agents operating abroad.

With respect to a foreign state's liability in tort, section 1606 of the FSIA provides that "if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for private parties under like circumstances."⁷⁶ The tort liability for states would not extend to punitive damages.⁷⁷ However, it is suggested that an agency of a foreign state might be compelled to respond in punitive damages, especially where a wrongful death action would lie.⁷⁸

The last exception to foreign sovereign immunity from suit is in the area of maritime liens. In section 1605(b) it is pro-

⁷³ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 20 (1976).

⁷⁴ 28 U.S.C. § 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 (1948).

⁷⁵ See W. Prosser, *THE LAW OF TORTS* 971-974 (4th ed. 1971).

⁷⁶ 28 U.S.C. § 1606 (1976).

⁷⁷ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 21-22 (1976).

⁷⁸ 28 U.S.C. § 1606 (1976).

vided that immunity will not be granted in any case in which a suit is brought to enforce a maritime lien against a vessel or cargo of a foreign state where a lien is founded upon a commercial activity.⁷⁹ This provision permits suit in admiralty as long as the plaintiff provides notice of such suit to the agent of the foreign state in charge of the vessel and notice of suit is served in the foreign state in question pursuant to section 1608 of the act.

Section 1605(b) further provides that notice of suit must be served on the person having possession of the vessel and cargo of the foreign state and that such notice replaces an arrest of the vessel as the means of acquiring jurisdiction.⁸⁰

C. The Impact on U.S. Domestic Practice

1. INTRODUCTION

The effects of sections 1604 and 1605 will be felt chiefly in the area of foreign state involvement in activities which can be characterized as commercial within the definitional provisions of section 1603 and the accompanying exceptions to immunity created by section 1605(a)(2). Simply stated, commercial activity is viewed in statutory terms as a regular course of commercial conduct or a particular commercial transaction or act.⁸¹ Where a court finds that a foreign state is in fact engaged in commercial conduct, immunity is denied under the terms of 1605(a)(2) if that act occurs within the U.S. or "causes a direct effect in the United States."⁸²

Serious questions arise, however, with respect to the direct effect notion contained in the statute. Almost any decision made by a foreign government which has to do with economic activities could conceivably impact upon the U.S. Suppose, for example, that a foreign government has contracted to purchase goods and services from an affiliate of an American corporation incorporated outside the U.S. Assume also that the affiliate

⁷⁹ 28 U.S.C. § 1605(b) (1976).

⁸⁰ *Id.*

⁸¹ 28 U.S.C. § 1603(d) (1976).

⁸² 28 U.S.C. § 1605(a)(2) (1976).

purchases its inventory in whole or in part from the parent corporation which, in turn, owns a substantial portion of the affiliate's stock. Does a breach of contract by the foreign government of a contract between that government and the affiliate, which was to be performed in the foreign state, give rise to a suit in the U.S.? This is possible under the new law. Yet, this remains an odd result in view of the fact that the transaction giving rise to the cause of action takes place in the territory of the foreign state and exists between the government of the foreign state and a corporation incorporated under the laws of the foreign state.

In the area of tort liability, the FSIA makes agents of a foreign state liable for tortious conduct. This grant of jurisdiction to the Federal District Courts to entertain such claims is made without many of the restrictions and qualifications which the United States Government retains in like circumstances. Moreover, the U.S. itself, while waiving immunity from suit in certain circumstances under the Federal Torts Claims Act, continues to enjoy immunity from execution. It is with respect to execution on judgments against foreign sovereigns that the greatest changes in prior U.S. practice occur.

2. COMMENCEMENT OF SUIT, ATTACHMENT AND EXECUTION: THE JUDICIAL PROCESS AND FOREIGN STATES UNDER THE FSIA

Prior to the FSIA most plaintiffs litigating against foreign sovereigns were forced to rely on attachment of the defendants' assets found within the U.S. to acquire *in rem* or *quasi in rem* jurisdiction.⁸³ The FSIA provides a statutory scheme for service of process upon representatives of foreign states thereby eliminating the need for attachment for purposes of obtaining jurisdiction.⁸⁴

However, the greatest change in existing U.S. practice relating to sovereign immunity is in the area of execution on judgments. Prior U.S. law permitted commencement of suits and

⁸³ Lowenfeld, *Claims against Foreign States — A Proposal for Reform of United States Law* 44 N.Y.U. L. REV. 901 (1969).

⁸⁴ 28 U.S.C. § 1608 (1976).

litigation on the merits of claims against foreign states by adherence to the restrictive view of immunity. As long as the Department of State voiced no objection on foreign policy grounds, courts would adjudicate the claims.⁸⁵ But in no event was execution permitted.⁸⁶ The FSIA permits attachment for purposes of execution and execution itself. It is in this respect that the act dramatically alters existing U.S. practice and poses the greatest potential difficulties for the Department of State given the fact that suggestions of immunity are specifically precluded by the act.

Section 1608 provides the statutory scheme for service of process on foreign governments. Consistent with sections 1605 (a)(2) and 1605(b), the instant provision provides that service of process upon a foreign state may be achieved by delivery of a copy of the summons and complaint to the defendant state or political subdivision according to special arrangement with the defendant⁸⁷ or according to an applicable international convention on service of judicial documents.⁸⁸ Section 1608 further provides that where service cannot be made under the above provisions, a copy of the summons, complaint and a notice of suit together with a translation of the pertinent documents into the official language of the state shall be dispatched by mail by the clerk of the district court to the head of the ministry of foreign affairs of the state concerned.⁸⁹

In addition, section 1608(a)(4) allows that if the above methods of service of process are not made effective within 30 days, the copies of the summons, complaint, and notice of suit should be sent to the Secretary of State. The Secretary shall then send the pertinent notice of suit to the particular state in question.⁹⁰

⁸⁵ *Victory Transport v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir. 1966).

⁸⁶ *Dexter & Carpenter v. Kinglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930). See also H. Steiner & D. Vagts, *MATERIALS ON TRANSNATIONAL LEGAL PROBLEMS* (2d ed. 1976) where the authors refer to execution as "the ultimate denial of immunity." *Id.* at 582-87.

⁸⁷ 28 U.S.C. § 1608(a)(1) (1976).

⁸⁸ 28 U.S.C. § 1608(a)(2) (1976).

⁸⁹ 28 U.S.C. § 1608(a)(3) (1976).

⁹⁰ 28 U.S.C. § 1608(a)(4) (1976).

The service of process provisions affecting state agencies as instrumentalities are essentially the same as those for service upon the foreign state itself.⁹¹

The underlying jurisdictional theory of section 1608 is consonant with the developments in U.S. law in the area of personal jurisdiction.⁹² Taken together with section 1607, the instant provision establishes a method of service of process on foreign sovereigns determined to have "substantial contacts" in the U.S. so as to make that sovereign amenable to suit in the Federal District Court.⁹³

The simple procedure of section 1608 permits the litigant to surmount what had been the threshold difficulty in instituting and maintaining a suit against a foreign sovereign. Existing case law gave no clear indication as to how a foreign state could be served.⁹⁴ Previously, the use of all forms of service of process on an ambassador, consul or agent of a foreign state had been prohibited.⁹⁵

As discussed above, the portions of the law which admits the greatest change and correlative potential for controversy are the sections which permit execution on the property of foreign governments which is located in the United States. The execution provisions of the new act stand for the general proposition that property of a foreign state, as defined in section 1603(a), is immune from attachment and execution subject to

⁹¹ 28 U.S.C. § 1608(b) (1976).

⁹² See Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 VA. J. INT'L. L. 487 (1974).

⁹³ The notice requirement enunciated in *Pennoy v. Neff*, 95 U.S. 714 (1877) and further elaborated in other cases is embodied in the notice provisions of the FSIA. This notice provision, when taken together with the "substantial contacts" notion, gives rise to the presumption that when service of process is made in accordance with the terms of the FSIA and where a foreign government or one of its instrumentalities engages in commercial activities having a nexus with the United States, that state is deemed amenable to suit. The FSIA in this respect, follows the pattern of the Federal Rules of Civil Procedure 4(d)(3) and 4(e).

⁹⁴ *Flota Maritima Browning de Cuba v. Motor Vessel Ciudad*, 355 F.2d 619 (4th Cir. 1964); *Cf. Hellenic Lines v. Moore*, 345 F.2d 978 (D.C. Cir. 1965).

⁹⁵ *Oster v. Dominion of Canada*, 144 F.Supp. 946 (N.D.N.Y. 1956); *Purdy v. Argentina*, 33 F.2d 95 (7th Cir. 1964).

the exceptions in sections 1610 and 1611.⁹⁶ The section-by-section analysis also states that attachment for purposes of obtaining jurisdiction either *in rem* or *quasi in rem* is also prohibited.⁹⁷

This analysis represents a significant departure from prior U.S. practice which permitted arrest of vessels for purposes of obtaining *in rem* jurisdiction⁹⁸ and attachment of other assets of a foreign government in order to obtain *quasi in rem jurisdiction*.⁹⁹ This prohibition against attachment for purposes of securing jurisdiction is consistent with the method for service of process outlined in section 1608. The drafters of the new bill are seeking to eliminate the problems attendant to attachment for purposes of securing jurisdiction. In the past, even when a plaintiff passed the hurdle of establishing that the transaction giving rise to the suit was of a commercial nature, the defendant could defeat plaintiff's claim by showing that the property itself was immune from the court's jurisdiction because it belonged to the government and somehow public in character.¹⁰⁰ In any event the property attached for jurisdictional purposes was never retained to satisfy a judgment under the earlier practice.¹⁰¹ Given the service of process provisions of section 1608, plaintiffs may avoid the inherent difficulties

⁹⁶ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 26 (1976).

⁹⁷ *Id.*

⁹⁸ This was the traditional means of securing jurisdiction. See *Berizzi Bros. v. S.S. Pesaro*, 271 U.S. 562, *Ex Parte Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1943); *Spacil v. Crowe*, 489 F.2d 614 (1974). All these cases involved attempts to secure *in rem* jurisdiction by way of attachment of vessels of a foreign state.

⁹⁹ For attachment proceedings to secure *quasi in rem* jurisdiction see, *N.Y. and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F.Supp. 684 (S.D. N.Y. 1955); *Weilamann v. Chase Manhattan Bank*, 221 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup.Ct. 1959); *Aerotrade Inc. v. Republic of Haiti*, 376 F.Supp 1281 (S.D. N.Y. 1974).

¹⁰⁰ This is precisely what occurred in *N.Y. and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F.Supp. 684 (S.D. N.Y. 1955). There, the Court, following a suggestion of the State Department held that the foreign government's property was immune from attachment and that the attachment of Korean bank deposits in New York must fail, even though the claim giving rise to the suit was commercial in nature.

¹⁰¹ The Tate Letter never provided for execution on property of the sovereign in order to satisfy judgments, nor did the pertinent case law. See *Weilamann v. Chase Manhattan Bank*, 221 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup.Ct. 1959).

with attachment and secure *in personam* jurisdiction over a defendant government by simple service of process in accordance with the guidelines in section 1608.

In addition to the fact that the service of process provision has made it unnecessary for plaintiffs to attach a foreign government's property, the section analysis accompanying section 1609 gives two additional policy reasons against attachment. First, by permitting attachment the entire judicial process of litigating claims is wholly dependent upon "the fortuitous presence of property in the jurisdiction."¹⁰² This is counter to the policy reasons underlying the Hickenlooper Amendment. That amendment depends upon the presence of the contested property in the U.S. in order to give effect to its stated purpose, *i.e.*, preventing the U.S. from becoming a "thieves market" for nationalized property.¹⁰³ Thus, under the Hickenlooper rationale, when property which was directly subject to expropriatory decrees enters the United States, *in rem* jurisdiction is attainable by way of attachment and a court of appropriate jurisdiction is left free to determine the respective rights of the parties involved. The act of state doctrine would not prevent a determination on the merits. Apparently, this hit or miss attachment proceeding and policy rationale underlying the Hickenlooper Amendment is no longer acceptable. However, the reasoning and policies which militate against attachment for purposes of acquiring jurisdiction evidently do not apply with the same force when commercial property is attached for purposes of execution.¹⁰⁴ Thus, the arguments put forward in section 1608 against attachment lose all of their force.

The section-by-section analysis also declares that attachment for purpose of acquiring *in rem* or *quasi in rem* jurisdiction are undesirable because they "can give rise to serious friction in United States foreign relations."¹⁰⁵ This reasoning does not apply, however, when it comes to execution on judgments. Un-

¹⁰² H.R. Rep. No. 1487, 94th Cong. 2d Sess. 26 (1976).

¹⁰³ H.R. Rep. No. 7750, 89th Cong. 1st Sess. 578 (1965).

¹⁰⁴ 28 U.S.C. § 1610(a)(1) (1976).

¹⁰⁵ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 27 (1976).

der section 1610 attachment for purposes of execution is permitted in certain circumstances.¹⁰⁶ It is difficult to see why attachment for purposes of acquiring jurisdiction is more likely to give rise to friction in foreign relations than attachment for purposes of execution. This is a fundamental inconsistency in the new act which is nowhere discussed or resolved in the section-by-section analysis. It is beyond cavil that attachment for the purpose of execution gives rise to far greater denigration of the sovereign independence of a state than would arrest for the sole purpose of establishing a jurisdictional basis.

Section 1610 carves out the exceptions to the general principles of immunity from attachment and execution in section 1609. Attachment in aid of execution would be permitted where the foreign state has waived its immunity, or when the property is used for the commercial activity upon which the claim was based,¹⁰⁷ if the property is related to property taken in violation of international law.¹⁰⁸ In cases where the property involved was acquired by gift, inheritance or is immovable property¹⁰⁹ located within the U.S. no immunity will issue. Likewise, there will be no immunity where the property consists of contractual obligations owed to a foreign government with respect to liability insurance.¹¹⁰ Section 1610(b) applies these same exceptions to property owned by a state's agency or instrumentality.¹¹¹ This provision of the act allows for attachment in order to prevent removal of assets under suit from the jurisdiction.¹¹²

The analysis of section 1609's inconsistencies applies with equal force to the instant section of the act. While the new bill continues to declare a policy against attachment on the grounds that it amounts to too great an affront to another sovereign state, this paragraph of section 1610 indicates an abid-

¹⁰⁶ 28 U.S.C. § 1610 *et seq.* (1976).

¹⁰⁷ 28 U.S.C. § 1610(a)(2) (1976).

¹⁰⁸ 28 U.S.C. § 1610(a)(3) (1976).

¹⁰⁹ 28 U.S.C. § 1610(a)(4) (1976).

¹¹⁰ 28 U.S.C. § 1610(a)(5) (1976).

¹¹¹ 28 U.S.C. § 1610(b) (1976).

¹¹² 28 U.S.C. § 1610(d) (1976).

ing lack of trust in a foreign government's good faith once that government is hailed into court by an aggrieved plaintiff. Following the affront and friction in foreign relations rationale set forth in the act, section 1610(d) seems to be adding insult to injury.

This provision brings about a profound change in prior U.S. practice. As the drafters of the bill point out, earlier case law has never permitted execution on judgments even where adequate jurisdictional bases were established in the first instance.¹¹³ Likewise the adoption of the restrictive theory of sovereign immunity in the Tate Letter and subsequent changes in State Department policy regarding *quasi in rem* jurisdiction did little to change previous policy against execution.¹¹⁴

The chief case dealing with the issue of execution on the property of a foreign sovereign is *Dexter & Carpenter v. Kunlig Jarnvagsstyrelsen*.¹¹⁵ There an agency of the Swedish Government brought suit for breach of contract against an American corporation; the corporation counterclaimed. The Swedish government's suit was dismissed and the lower court rendered a verdict in favor of the defendant's counterclaim. In a suit to enforce the judgment, the Circuit Court of Appeals for the Second Circuit stated that:

... consenting to suit does not give consent to seizure or attachment of the property of a sovereign government. . . . To so hold is not depriving our own courts of any attribute of jurisdiction. It is but recognizing the general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation at all peaceful times and under all circumstances.¹¹⁶

With respect to execution on judgments, one of the bill's long time advocates has voiced grave doubts about the wisdom of permitting execution on judgments against foreign states:

¹¹³ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 27 (1976).

¹¹⁴ *Weilamann v. Chase Manhattan Bank*, 221 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup.Ct. 1959).

¹¹⁵ 42 F.2d 705 (2d Cir. 1930).

¹¹⁶ *Id.* at 708.

To return briefly to the underlying rationale of the doctrine of sovereign immunity, a principle concern has always been that the acts of private litigants ought not to interfere with the sovereign functions of sovereign states. Civil actions are no longer conceived as "indignities". But the seizure of property — be it a ship, or a bank account, or vehicle — can severely disrupt governmental activity. The result may well be bad feelings between countries or even retaliation".¹¹⁷

It seems more than a little disingenuous to permit execution on judgments against foreign governments when the United States government is so immune.¹¹⁸ Thus, while other sections of the act purport to bring the U.S. law on sovereign immunity in line with the Federal Torts Claim Act¹¹⁹ and the general treatment of the U.S. government before domestic tribunals, this section of the FSIA which permits execution goes beyond the scope of the amenability to suit of the federal government.

Certain types of property continue to enjoy immunity from suit per section 1611 of the act. Under this section property held by international organizations,¹²⁰ central bank funds and military property¹²¹ are immune from execution. The general theory behind exempting funds held for a bank's own account, *i.e.*, those "used or held in connection with central banking activities,"¹²² is that execution on these funds "could cause significant foreign relations problems."¹²³ However, funds "used solely to finance the commercial entities" of the state are not immune.¹²⁴

This general prohibition against execution on military property is in keeping with current U.S. practice¹²⁵ but it is difficult

¹¹⁷ Lowenfeld, *Claims against Foreign States — A Proposal for Reform of United States Law* 44 N.Y.U. L. REV. 901 (1969).

¹¹⁸ *Buchanan v. Alexander*, 45 U.S. (11 How.) 19 (1846) *Cf.* *Glidden Co. v. Zdanok* 370 U.S. 530, 570 (1962).

¹¹⁹ 28 U.S.C. § 1346(d) (1964). *See* section 1605(a)(5) and H.R. Rep. 1487, 94th Cong. 2d Sess. 20 (1976).

¹²⁰ 28 U.S.C. § 1611(a) (1976).

¹²¹ 28 U.S.C. § 1611(b)(1) (1976).

¹²² 28 U.S.C. § 1611(b)(2) (1976).

¹²³ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 31 (1976).

¹²⁴ *Id.*

¹²⁵ *Id.*

to square this provision with section 1603(d) where the section-by-section analysis indicates that a contract for procurement of military goods will be considered commercial. If a foreign government has established a military procurement office in this country the activities attendant to negotiations of arms contracts would be considered commercial for the purposes of sections 1603(d) and 1605(a)(2). But if an action is commenced and a U.S. corporation receives a favorable judgment no execution on the property of the foreign government's procurement office is possible. In this way, the bill seems to create a right without a remedy.

Furthermore, the bill sets forth distinctions which are subject to a variegated judicial interpretation. This fact, coupled with the possibility that courts in foreign states when executing on American military property located within their territory, using the new act as precedent and support in subsidiary diplomatic correspondence may not be given to making such fine distinctions between property which might or might not be appropriately levied upon.

3. THE IMPACT OF THE FSIA ON THE JURISDICTION OF U.S. COURTS

The FSIA has wrought profound changes in the controlling U.S. law on sovereign immunity. In the first instance, the section of the act relating to service of process¹²⁶ introduces a broad concept of jurisdiction with respect to foreign states. If a foreign state has "substantial contact" with the U.S.,¹²⁷ i.e., is "doing business" in the United States, such activities are considered sufficient to vest U.S. courts with jurisdiction over the contract or tort claim at issue. Personal jurisdiction would attach by virtue of the commercial or allegedly tortious conduct itself, thus obviating the need for attachment of a foreign sovereign's property to secure *in rem* jurisdiction. Section 1609 is consonant with the act's service of process provisions insofar as it prohibits attachment for purposes of securing jurisdic-

¹²⁶ 28 U.S.C. § 1608 *et seq.* (1976).

¹²⁷ As set down in 28 U.S.C. § 1605(a)(2) (1976).

tion,¹²⁸ yet in the same breath the drafters would permit attachment of property belonging to a foreign sovereign for purposes of execution on a judgment.¹²⁹ The obvious inconsistency of these provisions is nowhere adverted to in the House Report¹³⁰ accompanying the act as passed.

There is enormous potential for conflict where execution on judgments are involved. The underlying rationale of sovereign immunity has been the express desire on the part of municipal courts to avoid affronts to the dignity of foreign states. Under prior law, civil suits against foreign nations were viewed as being a source of possible embarrassment to the Executive Branch. Under the new act, the likelihood of such embarrassment is increased dramatically as a result of the fact that execution on judgments against foreign states is permitted while at the same time the State Department is foreclosed from making suggestion of immunity where foreign policy considerations would seem to require such action.

4. CONCLUSION.

The main thrust of the FSIA is directed at providing a statutory basis for determining when and how parties can maintain a lawsuit against a foreign state or one of its agencies. The most significant changes brought about by the new act are in the areas of defining precisely when immunity will attach and what recourse litigants have once a foreign state is denied immunity. The act not only permits suits against states engaged in commercial conduct within the meaning of sections 1603 and 1605, but more significantly it provides for execution on judgments against foreign states.

¹²⁸ 28 U.S.C. § 1609 (1976). See H.R. Rep. No. 1487, 94th Cong. 2d Sess. 24-26 (1976).

¹²⁹ 28 U.S.C. § 1610 (1976). Another interesting aspect of eliminating *quasi in rem* attachment is to take most of the litigation out of New York where so many countries have banking and commercial assets, and shift it to the District of Columbia where service may be initiated *via* the Department of State. See 28 U.S.C. § 1608(c)(4) (1976).

¹³⁰ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 25-26 (1976).

The most troublesome aspect of the provision which permits suits "in which the action is based upon a commercial activity" is the expansive language of the jurisdictional phrases. Suits based on commercial acts performed by foreign states are cognizable in the U.S. Federal District Courts where "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."¹³¹ It remains unclear as to what extent U.S. domestic tribunals will feel compelled by the statutory language "commercial activity of the foreign state elsewhere" to examine the activities of foreign states which take place outside the U.S. territorial jurisdiction. It is interesting to contemplate just how far removed from direct contact an act must be in order to escape this asserted prescriptive jurisdiction. Virtually any conduct of a foreign government having appurtenances of commercial or economic activity will fall within the ambit of the act.

For example, would a Middle Eastern government retaining a U.S. consulting firm to determine the extent of Jewish ownership of U.S. corporations for blacklisting purposes amount to sufficient contact to give rise to suits under U.S. anti-trust laws? While the potential reach of the statute is imprecise, suffice it to say that foreign sovereigns may be haled into American courts to account for acts performed outside of the territorial confines of the U.S. but which have some impact upon the U.S. regardless of how tenuous it may be.

Perhaps the most bothersome aspect of the new act is the extent to which the U.S. might expect reciprocal treatment from other states. To illustrate, the refusal by officials of the Export-Import Bank to continue or to renew commercial loan agreements with business organizations in other countries could possibly give rise to suits in the courts of those states. The hypothetical plaintiffs in such a suit might make out a cause of action grounded in a theory of detrimental reliance or promissory estoppel. The decisions relating to the rescission or termination

¹³¹ 28 U.S.C. § 1605(a)(2) (1976).

of such loans and the attendant negotiations may have all been carried out within the United States. Yet, by applying the jurisdictional provisions of section 1605 of the new act reciprocally, courts of the state affected by the Export-Import Bank's actions may find sufficient jurisdictional contact so as to permit suit within that state. It remains unclear as to whether the United States would submit, without diplomatic objection, to suit in such cases where the transaction giving rise to the cause of action took place wholly within the territorial confines of the United States.

The potential for reciprocity extends in equal measure to the FSIA's execution provisions. It should be recalled that while the Department of State has supported a restrictive view of sovereign immunity as embodied in the Tate Letter, the State Department has never supported the view that, absented waiver, the execution on the property of a foreign state was permissible.¹⁸²

As previously mentioned, the FSIA permits execution on judgments adverse to a foreign state. Should a foreign state apply the new U.S. view on execution reciprocally the possible consequences are staggering. Moreover, it remains unclear as to whether the State Department would stand for execution on U.S. government property located abroad.

While the recent act declares that property used "in connection with a military activity and is of a military character" is immune from execution.¹⁸³ The House report accompanying the measure states that a court should look to the nature of the transaction and not its purpose¹⁸⁴ when passing upon the issue of immunity. Thus, the celebrated purchase of shoes for the army might not give rise to a claim of sovereign immunity.

Under this standard, were it given reciprocal effect in other states, a captain of an American naval vessel who purchases

¹⁸² *Weillamann v. Chase Manhattan Bank*, 221 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup.Ct. 1959). Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law* 44 N.Y.U. L. REV. 922-923 (1969).

¹⁸³ 28 U.S.C. 1611(b)(2)(A) (1976); H.R. Rep. No. 1487, 94th Cong. 2d Sess. (1976).

¹⁸⁴ H.R. Rep. No. 1487 94th Cong. 2d Sess. 20 (1976).

supplies while in a foreign port and subsequently refuses to pay would be subject to suit, sovereign immunity notwithstanding. The real question is whether the vessel itself would be subject to attachment and perhaps execution in the foreign state. Under the criteria of the FSIA the ship is immune from execution but it is impossible to anticipate how this section of the act would be interpreted and applied by states for purposes of according reciprocal treatment to the U.S. Ultimately, while execution remains an unlikely result under such circumstances, courts in other states cannot be expected to make the fine distinctions envisioned by the drafters of the bill. Moreover, while the vessel would, in all likelihood, be returned pursuant to diplomatic exchanges, potential problems remain in cases where the exact character of the property was less clear.

III. THE FOREIGN SOVEREIGN IMMUNITY ACT: SOME INTERNATIONAL LAW CONSIDERATIONS

A. Introduction

It might be useful at this juncture to provide a rapid survey of the purpose and structure of the FSIA. In the first instance, the drafters of the bill have expressed the view that:

the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in the United States courts.¹³⁵

The bill further purports to be a codification of prevailing international law whereby:

states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.¹³⁶

¹³⁵ 28 U.S.C. § 1602 (1976).

¹³⁶ *Id.*

Structurally, the statute begins with a presumption of sovereign immunity¹³⁷ and proceeds to provide exceptions to that immunity¹³⁸ consonant with the definitional provisions of the act.¹³⁹ Once it has been established that a state is not immune from suit in American courts, then litigation may commence in accordance with the act's service of process provisions.¹⁴⁰ Should a court render a judgment adverse to a foreign state, party to the litigation, then execution on non-immune assets belonging to the foreign government in question is possible.¹⁴¹

The implications of the new act with respect to prior U.S. domestic practice have been amply dealt with in the preceding discussion. This section of the paper examines the international law ramifications which are possible under the recent sovereign immunity legislation. Briefly stated, the potential for conflict with currently accepted state practice comes in three areas dealt with by the bill: (1) the distinction made between commercial and governmental activities; (2) the continued legislative adherence to notions of prompt, adequate, and effective compensation; and, (3) the possibility of execution against a foreign government's property and the concomitant potential for reciprocal treatment of U.S. property located abroad.

B. The Impact of the FSIA on the Practice of States

1. COMMERCIAL CONDUCT OF FOREIGN GOVERNMENTS

Section 1605, when coupled with the definitional provisions embodied in section 1603, has the net result of denying immunity to states when they are engaged in essentially commercial acts. The act states in this regard that:

A 'commercial activity' means either a regular course of commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of

¹³⁷ 28 U.S.C. § 1604 (1976).

¹³⁸ 28 U.S.C. § 1605 (1976).

¹³⁹ 28 U.S.C. § 1603 (1976).

¹⁴⁰ 28 U.S.C. § 1608 (1976).

¹⁴¹ 28 U.S.C. § 1610 (1976).

the course of conduct or particular transaction or act, rather than by reference to its purpose.¹⁴²

One might reasonably conclude that almost any transaction is now viewed as without the scope of sovereign immunity, as virtually all governmental activity involves commercial conduct in one way or another. Thus, a purchase of shoes for the army would no longer be accorded sovereign immunity.

But, in attempting to define what constitutes a commercial and, hence, non-governmental activity, the drafters of the bill have demonstrated an unjustified preference for a market economy and limited governmental participation in the economic sector. However, this view is held almost exclusively by capital exporting states who have a specific notion of the appropriate relationship between government and the private sector. To say the least, this view is not shared by the majority of states, nor is there any reason to believe that such a view will be adopted by the majority in the near future.

Governments of developing states tend to assume a sharply instrumentalist role in economic development. Such states would view virtually all procurement activities, government joint ventures with private foreign investors, and the whole range of economic managerial functions as appropriately sovereign acts. In this context, there is serious doubt as to the relevance of the restrictive theory of sovereign immunity. However, proponents of the bill confidently state that:

In the modern world when foreign state enterprises are every day participants in commercial activities (this bill) is urgently needed legislation . . . the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized at international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*).¹⁴³

While the bill gives statutory force to the restrictive theory, it falls short of being a true *opinio juris* in the practice of states.

¹⁴² 28 U.S.C. § 1603(d) (1976).

¹⁴³ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 7 (1976).

Although the restrictive view of sovereign immunity has achieved a large measure of acceptance among commentators¹⁴⁴ and among most European states, there is substantial evidence that the restrictive view is in fact the minority position.¹⁴⁵

2. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES: ABSOLUTE SOVEREIGNTY

The notion of sovereignty propounded by 108 countries in the United Nations Resolutions on Permanent Sovereignty over Natural Resources¹⁴⁶ stands in opposition to the "substantial contacts"¹⁴⁷ notion articulated in section 1602 of the FSIA. According to the "substantial contacts" rationale, any activity engaged in by a foreign state deemed to be commercial in nature within the meaning of section 1603 and impacting upon the United States will be subject to the jurisdiction of the Federal District Courts.

Thus, under this analysis any suit arising out of any licensing or contractual agreement between a foreign government and an American corporation which has for its purposes a "regular course of commercial conduct,"¹⁴⁸ such as a mineral extraction company" or state trading enterprise, would be subject to judicial examination by American courts. The potential for conflict between the U.S. view and that of developing states is clear. This resolution on permanent sovereignty strongly affirmed the inalienable right of states to permanent sovereignty over natural resources.¹⁴⁹ Matters were taken further by paragraph 4(e) of the declaration which states in pertinent part:

¹⁴⁴ Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States* 28 *BR. YB. OF INT'L. L.* 220 (1951).

¹⁴⁵ G.A. Res. 3171 (XXVIII) of Dec. 17, 1973 adopted by a vote of 108 to 1 with 16 abstentions, reproduced in 68 *AM. J. INT'L. L.* 381 (1974).

¹⁴⁶ *Id.*

¹⁴⁷ H.R. Rep. No. 1487, 94th Cong. 2d Sess. 17 (1976).

¹⁴⁸ *Id.* at 16.

¹⁴⁹ Operative paragraph 3 G.A. Res. 3171 (XXVIII) of Dec. 17, 1973. A separate vote was taken on this paragraph with the roll call vote being 86 for to 11 against. Not surprisingly among those voting against were the United States and Belgium, France, Federal Republic of Germany, the Netherlands and the United Kingdom, all of whom with the exception of the United States are contracting parties to the European Convention of State Immunity.

The new international economic order should be founded on full respect for the following principles: . . . (a) full permanent sovereignty of every state over its natural resources and all economic activities . . . No state may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right . . .¹⁵⁰

It can be argued with some force that denying immunity to a state being sued for breach of a mineral licensing agreement in a U.S. court might be viewed in terms of the above resolution as a type of impermissible coercion.

Under the old theory of absolute immunity, a forum state's chief concern was with avoiding an affront to the dignity of foreign states and for the concept of sovereign equality. Under the Permanent Sovereignty theory, considerations of sovereign equality are coupled with an overwhelming concern for a state's territorial sovereignty over its natural wealth. Pursuing this analysis one step further it might be argued that the absolute theory of sovereign immunity is revived in the theory of Permanent Sovereignty. While General Assembly resolutions are not binding upon states in a positivist sense, they are evidence of a consensus among states. As such, they must be reckoned with by any state which purports to codify and adhere to existing international practice.

As discussed above, while distinctions between commercial transactions as set forth in 1603(d) and traditionally sovereign acts are readily ascertainable within a free market economy, the contours of such distinctions become less apparent as soon as the analysis is applied to mixed or socialist economies. The fact that numerous governments view differently their relationship with the economic life of their respective states complicates the mode of inquiry into the existence of generally accepted principles of international law. This great diversity of views concerning the extent of sovereign immunity has been amply noted by commentators, and one might reasonably conclude from an examination of the literature that no true consensus exists.

¹⁵⁰ *Id.* at paragraph 4(e).

C. The FSIA and the Problem of Foreign Nationalizations

The FSIA denies immunity in cases arising out of foreign expropriations where the expropriating state has paid no compensation. The act states that no immunity will attach in suits "in which rights in property taken in violation of international law are in issue."¹⁵¹ The accompanying section analysis further provides that:

the term 'taken in violation of international law' would include the nationalization or expropriation of property without payment of prompt adequate and effective compensation required by international law.¹⁵²

Not unlike its action in the Hickenlooper Amendment, Congress is presenting in the FSIA its view of international law, a distinctly Western view which is borne out neither by the practice of other states nor, for that matter, by past and present U.S. practice.

As early as 1933 the United States accepted the validity of a foreign expropriation in the Litvinov Assignments. As a condition precedent to the recognition of the Soviet Union in the 1930's, the U.S. demanded some resolution of the nagging problem of unsatisfied American claimants who had lost property as a result of Russian nationalization decrees in the wake of the 1917 Revolution. As a result of protracted negotiations, the U.S. received *via* the Litvinov Assignments whatever rights were acquired by the Soviet government as a result of the expropriation of the property held by Russian corporations.

In *U.S. v. Pink*,¹⁵³ the appellee had challenged the validity of the Litvinov Assignments on the ground that the nationalizations by the Soviet government were void *ab initio*, and as such the United States government received no rights to the property at issue.

In upholding the validity of the Assignments, Mr. Justice Douglas reasoned that:

¹⁵¹ 28 U.S.C. § 1605(a)(3) (1976).

¹⁵² H.R. Rep. No. 1487, 94th Cong. 2d Sess. 19 (1976).

¹⁵³ 315 U.S. 203 (1941).

the right to the funds or property in question became vested in the Soviet Government as the successor to the First Russian Insurance Co.; that this right has passed to the United States under the Litvinov Assignment; and that the United States is entitled to the property as against the corporation and the foreign creditors.¹⁵⁴

First the State Department and then the Supreme Court recognized, at least by intimation, the validity of the Soviet government's actions.

Furthermore, on a subsequent occasion the Supreme Court reasoned further that there is, in fact, no legally mandated international standard with respect to the duty of states to give prompt, adequate and effective compensation. Writing for the court in *Banco Nacional de Cuba v. Sabbatino*,¹⁵⁵ Mr. Justice Harlan noted:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens . . . Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interest and are inappropriate to the circumstances of emergent states. . . . When we consider the prospect of the courts characterizing foreign expropriations, however justifiably, as invalid under international law and ineffective to pass title, the wisdom of the precedents is confirmed.¹⁵⁶

The lack of a consensus among states was not lost on the Court in the most recent case before it dealing with foreign expropriations. In *Dunhill v. Republic of Cuba*,¹⁵⁷ Mr. Justice White's plurality opinion held that the act of state doctrine did not apply to a state's commercial activities, but in the same opinion the Court adverted to the absence of consensus in the area of expropriations:

¹⁵⁴ *Id.* at 234.

¹⁵⁵ 376 U.S. 298 (1964).

¹⁵⁶ *Id.* at 430.

¹⁵⁷ 96 S.Ct. 1854 (1976).

There may be little codification or consensus as to the rules of international law concerning exercise of governmental powers, including military powers and expropriations, within a sovereign state's borders affecting the property of persons or aliens.¹⁵⁸

Moreover, Mr. Justice Marshall, writing for the four dissenters in the same case, echoed the rationale underlying the Court's decision in the earlier *Sabbatino* case, stating:

The applicability of the act of state doctrine in these circumstances is controlled by *Sabbatino* itself. As the Court there noted, "there are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens". Indeed, the absence of any suggestion that Cuba's intervention program was discriminatory against United States citizens renders the lack of consensus as to applicable principles of law even more apparent here than in *Sabbatino*.¹⁵⁹

It is apparent from the dicta in both *Banco Nacional de Cuba v. Sabbatino* and *Dunhill v. Republic of Cuba* that the Supreme Court has yet to find a generally accepted standard with respect to foreign nationalizations.

As a practical matter, assertions that international law requires prompt, adequate and effective compensation wear thin when compared to the record of past international settlements of claims. In fact, both expropriating and complaining nations have displayed a marked inconsistency between their stated positions and their actions.

The United States, notwithstanding vociferous objections to nationalizations without prompt, adequate and effective compensation, has been given to accepting half a loaf when it comes to settlement of the claims of U.S. nationals. The ability for compromise is also present on the side of nationalizing states. The case of the U.S. — Peru Agreement on Compensation for Expropriated Properties of U.S. Nationals¹⁶⁰ amply demonstrates the fact that neither of the parties in a dispute over

¹⁵⁸ *Id.* at 1870.

¹⁵⁹ *Id.* at 1881.

¹⁶⁰ 13 INT'L. LEG. MATS, 392 (1974).

expropriation practices what it preaches. Contrary to its public pronouncements, Peru, a nationalizing state and supporter of the Permanent Sovereignty over Natural Resources¹⁶¹ resolutions gave over some \$76 million in satisfaction of U.S. claims. Likewise, the U.S. accepted this amount which was considerably less than originally demanded. One is left with the distinct impression that not only is there no prevailing state practice or custom within the meaning of section 38(1)(b) of the Statute of the International Court of Justice, but in practice states disregard their own stated views with respect to the problem of expropriation.

Given the wide spectrum of views, there is serious question as to whether the American legislative response to the immunity problem represents any meaningful addition to the custom and usage of states. The chief conceptual problem with the FSIA, respecting international law, is that it is an attempt to impose by way of U.S. domestic legislation artificial order in an area of law where little order is to be found.

D. Execution on Foreign Government Property and International Practice

As indicated above,¹⁶² the execution provision of the FSIA could have profound effect upon U.S. relations with other states. While there continues to be considerable disagreement among states with respect to the appropriate standards for granting or denying a state immunity from suit, execution on judgments runs to the nerves of the concept of sovereign equality. In the past, the prevailing practice of states has been to prohibit execution on judgments against friendly foreign states.¹⁶³

The European Convention on State Immunity leaves up to the contracting state the effect it shall give to a judgment rendered against it in the court of another state.¹⁶⁴ Furthermore article 21 states:

¹⁶¹ U.N.G.A. Res. 3171 (XXVIII) Dec. 17, 1973.

¹⁶² See discussion in text at fn. 105 to 116.

¹⁶³ See discussion in text at fn. 124 to 127.

¹⁶⁴ 11 INT'L. LEG. MATS, 472, 474 (1972).

Where a judgment has been given against Contracting State and that state does not give effect thereto, the party which seeks to invoke the judgment shall be entitled to have determined by the competent court of that State the question whether effect should be given to the judgment in accordance with Article 20. Proceedings may also be brought before this court by the State against which judgment has been given, if its law so permits.¹⁶⁵

The European Convention, which gives the force of treaty to the restrictive theory, stops short of permitting the court of the forum to give full effect to its judgment. The convention, unlike the U.S. act, derives its force at international law from the fact that the contracting parties have explicitly consented to be subject to civil suits in the courts of other contracting states. Yet with respect to execution, the European community thought it wiser to reserve in themselves the power to determine what effect should be given to judgments against them in the courts of other contracting states. It should be remembered, however, that the European Convention is a multilateral agreement binding on only those states which are party to it.

By permitting execution on property owned by a foreign government, the U.S. is departing from the prevailing practice of states. It is, likewise, subjecting itself to reciprocal treatment from states whose jurisprudence leaves little room for the fine distinctions envisioned by section 1611(b). The fact that the executive branch is foreclosed from making suggestions of immunity from suit and execution merely compounds the problem. While FSIA will allow many deserving plaintiffs to recover in actions previously denied by immunity from suit, the price paid for such apparent equity may prove unacceptably high.

E. Conclusion

While there are several obvious problems with the FSIA insofar as it purports to codify prevailing international state

¹⁶⁵ *Id.*

practice and custom, the greatest potential for conflict resides in the Act's execution provisions. Formerly, the United States secure in the knowledge that, regardless of adverse judgments of foreign states there would be no execution against U.S. property located abroad. The FSIA has stripped away this fundamental protection and right of sovereignty. The result in international law is that the U.S. becomes bound by its own practice and *autointerpretation* in subsequent diplomatic correspondence relating to judgments and execution against American-owned property located abroad.

Furthermore, the U.S. as claimant before an international tribunal or arbitral body will be placed in the unfortunate position of claiming a return of property abroad already seized, rather than as the respondent refusing to pay up following the entry of a judgment against it. Thus, where prior practice allowed for flexibility in responding to claims presented in foreign courts against the United States government, such flexibility is circumscribed by the new law.

One last point might be made at this juncture, the chief supposed benefit of the new bill is that it gives private litigants their day in court to present claims against foreign governments. This raises an additional question as to why American business should receive the added protection, in otherwise risky business ventures, of being able to bring suit in U.S. municipal courts for acts carried out elsewhere. Apparently, the State Department is comfortable with a tradeoff of flexibility for the perceived advantages of litigation of claims against foreign governments on a case-by-case basis. A further question arises with respect to the future lump sum settlements and diplomatic resolution of outstanding disputes between U.S. businesses located abroad and foreign governments. This loss of flexibility in the conduct of our foreign relations is, however, the price to be paid for the effective underwriting of the commercial enterprise of U.S. business abroad.

IV. SEPARATION OF POWERS AND THE FOREIGN SOVEREIGN IMMUNITY ACT

A. *The Executive Branch, Congress and Foreign Affairs*

1. INTRODUCTION

Although it is beyond the scope of this paper to provide either a survey of the literature¹⁶⁶ on the topic of presidential powers and foreign policy or to engage in an exegesis of the numerous pronouncements of the founders on the subject, a critical analysis of the separation of powers issues raised by the passage of the FSIA is unavoidable. Therefore, the discussion of the constitutional problems posed by the FSIA will be confined to some of the several theories of executive power in the field of foreign relations, to an analysis of the major cases dealing with presidential authority and sovereign immunity, and to those infrequent instances where the Supreme Court has been compelled to pass upon the constitutionality of acts of Congress in the foreign relations area.

The potential constitutional questions which exist following the passage of the FSIA arise in most part from the fact that one of its express purposes is the exclusion of the State Department from the process of deciding when foreign nations will be accorded immunity from suit.¹⁶⁷ To recapitulate, the past practice of U.S. courts in cases involving claims of sovereign immunity had been to give substantial weight to executive suggestions in deciding when immunity is warranted under the circumstances of each case. Where the acts giving rise to the suit are essentially commercial, that is, coming within the meaning of sections 1603 and 1605 of the new bill, the courts are free to adjudicate the merits of the case. At no time during pleadings will the courts inquire into the

¹⁶⁶ See e.g., Berger, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH*, (1974), Henkin, *FOREIGN AFFAIRS AND THE CONSTITUTION*, (1972); Note, *The Relationship between the Executive and the Judiciary; the State Department as Supreme Court of International Law*, 53 MINN. L. REV. 389 (1968), Rubin, *A Wholesome Discretion*, 20 N.Y.L. FORUM 569 (1975), Henkin, "A More Effective System" for Foreign Relations: *The Constitutional Framework* 61 VA. L. REV. (1976).

¹⁶⁷ See H.R. 94-1487, Statement of Purpose p. 7.

position taken by the Executive Department regarding the particular case before the courts. Although the former State Department procedure has been roundly criticized,¹⁶⁸ there is considerable authority supporting the view that suggestions of immunity are within the ambit of executive power.

2. THE EXECUTIVE BRANCH AND THE RECOGNITION OF FOREIGN STATES

It is well established that the executive department has the exclusive power to recognize governments, states and the existence of a state of belligerency.¹⁶⁹ It has been suggested that the power to recognize states is derived from Article II sec. 2 of the Constitution where it is provided that the President shall exercise the function of receiving ambassadors and other public ministers.¹⁷⁰ In *The Prize Cases*¹⁷¹ the United States Supreme Court gave explicit endorsement to the idea of exclusive executive power to recognize the existence of a state of belligerency. Those cases involved the possible extent of Great Britain's neutral obligations during the American Civil War. The chief dispute was whether President Lincoln's blockade of the parts held by the Confederacy could justify British recognition of a state of belligerency between the Federal and Confederate forces. With respect to the President's authority in this area the court reasoned:

Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts

¹⁶⁸ Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L. LAW, 168 (1946); Panel, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. OF THE AM. SOC. OF INT'L. L., 182 Note, *Sovereign Immunity — Proposed Statutory Elimination of the State Department's Role* — S.566 93rd Cong., 1st Sess. (1973), 15 HARV. J. INT'L. L., 157 (1974).

¹⁶⁹ Henkin, *THE CONSTITUTION AND FOREIGN AFFAIRS* (1972).

¹⁷⁰ *Id.* at 67-69.

¹⁷¹ 67 U.S. (2 Black) 635 (1863).

of the political department of the Government to which this power was entrusted.¹⁷²

A more recent case demonstrates the degree to which the courts accept executive prerogative with respect to the recognition of foreign states and governments. In *Kunstsammlungen zu Weimar v. Elicofon*,¹⁷³ a case involving art treasures removed from Germany at the end of World War II, the Court of Appeals for the Second Circuit refused to allow representatives of the German Democratic Republic to intervene in the suit on the grounds that the State Department refused to recognize the G.D.R.

One commentator has stated unequivocally that the power to recognize foreign states resides exclusively in the President.

For many years now, Congress has not seriously doubted either that the President is the sole organ of communication with foreign governments. Congress may not give or receive communications on behalf of the United States, or negotiate with foreign governments, or "conduct foreign relations" . . . it [Congress] cannot itself (or effectively direct the President to) recognize foreign states or governments, or establish or regulate or break relations with them, or terminate treaties, or proclaim "doctrines", or determine present and future policies or attitudes of the United States, though it may express its "sense" and request or exhort the President.¹⁷⁴

Thus, the President is constitutionally mandated or, by traditional deference, is vested with the authority to recognize governments. It is but a short step to presumption that the executive might also exercise policy discretion in determining the reach and effects of recognition.

This notion that the President's power to recognize foreign states carries with it a concomitant power to determine subsequent policy with respect to states so recognized was upheld in *United States v. Pink*,¹⁷⁵ a case involving the valid-

¹⁷² *Id.* at 639.

¹⁷³ 478 F.2d 231 (2d Cir. 1973).

¹⁷⁴ Henkin, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

¹⁷⁵ 315 U.S. 203 (1942).

ity of the Litvinov Assignments.¹⁷⁶ In *Pink*, Justice Douglas speaking for the Court stated that: "The powers of the President in the conduct of foreign relations included the power, *without consent* of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees."¹⁷⁷ Justice Frankfurter's concurrence found it "indisputable" that "the President's control of foreign relations includes the settlement of claims [and] . . . the power to establish normal relations with a foreign country."¹⁷⁸

Given this precedent for the proposition that the President's power to communicate with and recognize foreign governments carries with it an allied power to determine the policy underlying such recognition, the executive may be viewed as having authority to determine what rights are to be accorded recognized states by virtue of their status. Such discretion was implicit in the State Department's past practice of suggesting or denying immunity. Moreover, in light of the fact that the executive is answerable to other states in diplomatic correspondence, the power to issue suggestions of immunity has been a valuable and necessary prerogative.

A further point should be noted here, the drafters and supporters of the FSIA have consistently overlooked the fact that U.S. municipal law cannot override U.S. obligations at international law. The prevailing view in international practice is that a domestic legislative directive does not provide an adequate answer to a foreign state's objection to acts and decisions of U.S. domestic courts. The implication being that U.S. legislation speaks only to municipal law and not to international law except to the extent to which it is a precedent or ripens into state practice within the meaning of article 38(1)(b) of the Statute of the International Court of Justice. Thus, where executive action is compelled by legislation and

¹⁷⁶ The Assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs.

¹⁷⁷ 315 U.S. at 229.

¹⁷⁸ *Id.* at 240-241.

where a dispute over the legality of such action arises at international law, the regularity of the domestic legislative process is irrelevant to any international law issues. The net result of all this is that the executive department is placed in a no-win position or, in the language of sovereign immunity case-law, is likely to be "embarrassed" in the conduct of foreign affairs. The underlying rationale for judicial deference in immunity cases had been precisely this, to avoid embarrassment to the Executive Branch.

Additional support for exclusive executive authority in the realm of recognition of foreign states and in the policy judgments surrounding suggestions of immunity is found in *United States v. Curtiss-Wright*¹⁷⁹ where Justice Sutherland quoted the now famous "sole organ" language of John Marshall¹⁸⁰ in setting forth the contours of executive authority in the area of foreign relations:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress, It is quite apparent that if, in the maintenance of our international relations, embarrassment — perhaps serious embarrassment — is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.¹⁸¹

While there is considerable disagreement as to whether this sweep of power over foreign affairs is warranted by the intent of the framers¹⁸² the Supreme Court has viewed *Curtiss-*

¹⁷⁹ 299 U.S. 304 (1936).

¹⁸⁰ 10 Annals of Cong. 613 (1800) [1799-1801].

¹⁸¹ 299 U.S. at 320.

¹⁸² Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 15-17, (1971).

Wright as standing for the proposition that the executive has primary competence in the field of foreign relations.¹⁸³ More recently in *New York Times Co. v. United States*,¹⁸⁴ where the Court refused to enjoin the publication of *The Pentagon Papers* on First Amendment grounds, there was ample support among the separate opinions for the view that the President is endowed by the Constitution with primary responsibility in international relations. The concurring opinion of Mr. Justice Stewart stated in no uncertain terms that:

In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power [is] largely unchecked by the Legislative and Judicial branches¹⁸⁵

Judicial deference to the executive was made clear with respect to suggestions of sovereign immunity. In *Ex Parte Peru*,¹⁸⁶ a case involving the detention of a Peruvian vessel libeled by an American plaintiff, the court stated: "... Courts may not so exercise their jurisdiction, by the seizure and detention of property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations."¹⁸⁷

The recognition of the executive's role in determinations of when immunity is warranted was reiterated in a recent case before the Fifth Circuit. In *Spacil v. Crowe*,¹⁸⁸ a suit arising out of the arrest of a Cuban vessel engaged in essentially commercial activity, the court applied the sole organ rationale to reach the conclusion that a suggestion of immunity by the State Department was conclusive on the court.

¹⁸³ *First Nat'l. City Bk. v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) Mr. Justice Rhenquist cited both *Curtiss-Wright* and *United States v. Belmont*, 301 U.S. 324 (1937) with approval as "the exclusive competence of the Executive Branch in the field of foreign affairs" 406 U.S. at 766.

¹⁸⁴ 403 U.S. 713 (1971).

¹⁸⁵ *Id.* at 727.

¹⁸⁶ 318 U.S. 578 (1943).

¹⁸⁷ *Id.* at 730.

¹⁸⁸ 489 F.2d 614 (5th Cir. 1974).

The court reasoned that it was required to take notice of executive directives in this area so as not "to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy."¹⁸⁹ It is clear that the sole organ theory has a continued vitality in cases where the courts are called upon to entertain suits which touch upon our foreign relations. Moreover, with regard to the executive's traditional role in determining a foreign state's immunity from suit, the State Department was exercising a function under its general power to recognize states and to determine what results flow from recognition. Thus, the FSIA, insofar as it cuts the State Department out of the decision-making process attendant to claims of sovereign immunity, unnecessarily tampers with the separation of powers. Given that ours is a system of checks and balances and not a parliamentary democracy, such interference is of questionable wisdom.

B. *Congress, the Executive and the Courts: A Constitutional Triad*

It is beyond cavil that in most respects the Executive Branch exercises plenary power in the conduct of foreign relations.¹⁹⁰ The Courts have recognized, without apparent unease, executive authority in the realm of foreign relations. The judiciary, while circumspect in passing upon issues having a direct impact upon foreign policy, has not, however, failed to take note of its responsibility within the Constitution. Even Justice Sutherland in *Curtiss-Wright*¹⁹¹ felt compelled to advert to the role of the courts in deciding cases affecting foreign affairs. While asserting that the President possessed "plenary and exclusive power"¹⁹² in the field of international relations, Justice Sutherland further stated that this power "like every other govern-

¹⁸⁹ *Id.* at 620.

¹⁹⁰ Henkin, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 94-97 (1972).

¹⁹¹ 299 U.S. 304 (1936).

¹⁹² *Id.* at 320.

mental power, must be exercised in subordination to the applicable provisions of the constitution.”¹⁹³

There can be no doubt but that while the Judicial Branch recognizes the paramount constitutional position of the executive in foreign relations, it is also quick to point out that the Executive must conduct foreign affairs within the acceptable limits of the Constitution as a whole. The holding in *Youngstown Sheet and Tube Co. v. Sawyer*¹⁹⁴ demonstrates the fact that even when the President is exercising war powers, his actions must pass constitutional muster. In *Youngstown Sheet and Tube*, the court held that the seizure of the steel mills by President Truman in order to avert a strike during a time when U.S. military intervention in Korea seemed imminent was unconstitutional.¹⁹⁵ While recognizing general executive power under Article II, Justice Black, speaking for the court declared “we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.”¹⁹⁶ The conclusion is inescapable, although the President may invoke constitutionally mandated powers under Article II, the exercise of those powers must conform to the dictates of the Constitution with the reach of those powers being limited so as to fit the total constitutional scheme of government.

Where tension exists between the Judicial and Executive Branches as to the appropriate function of each, the judiciary, of course, reserves the right to resolve any disputes. Thus, in *Banco Nacional de Cuba v. Sabbatino*¹⁹⁷ the majority, though wishing to avoid “the possibility of conflict between the Judicial and Executive Branches,”¹⁹⁸ further stated that “it cannot of course be thought that every case or controversy which touches the foreign relations of our government is committed

¹⁹³ *Id.*

¹⁹⁴ 343 U.S. 579 (1952).

¹⁹⁵ *Id.* at 585-588.

¹⁹⁶ *Id.* at 587.

¹⁹⁷ 376 U.S. 398 (1964).

¹⁹⁸ *Id.* at 433.

by the Constitution to the Executive and Legislative Departments."¹⁹⁹ The inference to be drawn from this and other cases in which the courts have been called upon to decide issues having foreign policy implications is not so much that the judiciary is automatically compelled to abstain from adjudication on the merits, but that the acts complained of violate no constitutional limits on the executive power.

In cases involving sovereign immunity, there was a clear potential for conflict between the Executive and Judicial Branches. On one hand, it is argued that sovereign immunity is a legal question appropriately dealt with by the courts, on the other hand, prior case law has amply demonstrated the willingness of the court to entertain executive suggestions of immunity. A desire to resolve this conflict, apparent or real, was a chief motivation behind the FSIA. The drafters of the legislation resolved to leave sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to suggestions of immunity from the executive.²⁰⁰ In effect, Congress, at the urging of the Executive Branch, has intervened to settle an issue which exists between the Executive and Judiciary. This raises the fundamental question of whether Congress, in the exercise of its Article I powers can confer jurisdiction on Article III courts in an area which impacts upon a field traditionally viewed as being within the ambit of the Executive Branch's powers under Article II. Moreover, the Congress has attempted to resolve the issue to the extent of foreclosing the executive from any participation in the decision making process underlying grants of immunity to foreign states.

It might be noted here that Congress once before attempted to resolve uncertainty which existed in the relationship between the executive and judicial branches. In the Hickenlooper Amendment,²⁰¹ Congress directed the courts to apply "accepted" principles of international law in cases involving expropriations and the act of state doctrine. Congress discounted

¹⁹⁹ *Id.* at 423.

²⁰⁰ H.R. 94-1487 p. 12.

²⁰¹ 22 U.S.C. § 2250 (1965).

the potential for conflict between executive and judiciary, a conflict which provided the rationale for Justice Harlan's opinion in *Banco Nacional de Cuba v. Sabbatino*.²⁰² But one should hasten to add that even the Hickenlooper Amendment reserved in the President the power to determine to what extent act of state principles ought to apply.²⁰³ However, there is no similar provision in the FSIA.

The FSIA's congressional preemption of the power of the executive to issue suggestions of immunity could be met with considerable resistance by the federal courts. There are some precedents which suggest it is an unconstitutional invasion of the judicial function when Congress purports to bind the federal courts to decide a case in accordance with a rule of law independently unconstitutional on other grounds.²⁰⁴ The United States Supreme Court has once before rejected congressional attempts at imposing rules of decision upon Article III courts where such rules infringed upon the Executive's constitutional prerogatives. In *United States v. Klein*,²⁰⁵ a case involving the effect of a Presidential pardon in proceedings to recover property confiscated by agents of the government during the Civil War, plaintiff won judgment in the Court of Claims for recovery of proceeds of sale of confiscated property. The judgment was based on legislation which accorded a right of recovery to certain noncombatant rebels upon proof of loyalty. Previously, the Supreme Court had held that loyalty required by the statute could be proved by a Presidential pardon. Pending appeal from the judgment by the United States, Congress passed an act providing that no pardon should be admissible as proof of loyalty.

²⁰² 376 U.S. 398 (1964).

²⁰³ Hickenlooper Amendment 22 U.S.C. § 2250 sub. para. 620(e)(2). Professor Henkin has questioned the appropriateness of congressional intervention in such cases. He has stated: "it does appear that when the Executive and the Judiciary are agreed, in a matter which involves their respective functions and threatens to embroil their relations *inter se*, the Congress might at least afford them time and opportunity to prove their agreed doctrine, Henkins, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972).

²⁰⁴ See Hart and Weschler, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 315-317 (2d ed. 1973).

²⁰⁵ 13 Wall 128 (U.S. 1872).

The statute further directed the Court of Claims and the Supreme Court to dismiss for want of jurisdiction any pending claims based on a pardon.

The Court in *Klein* held that the supervening statute was unconstitutional:

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government — the Legislative, the Executive, and the Judicial — shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned and removes all its penal consequences. It may be granted on conditions. In these particular pardons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration.²⁰⁶

Thus, the Supreme Court felt no compunctions about declaring void a statute which it found to infringe upon the constitutional power of the executive. If we assume that the Executive Branch's power to recognize foreign states and governments carries with it an attendant power to prescribe underlying policies like the immunity of such states from suit, then it is but a short step to concluding that the FSIA is an impermissible infringement on those powers.

While it can be argued that executive authority to issue suggestions to sovereign immunity is not explicit in the same way as the power to pardon, the notion of separation of powers seems offended by the intrusion of Congress. The doctrine of separation of powers does, however, have a certain core beyond

²⁰⁶ *Id.* at 147. Nor can Congress usurp the President's power to pardon criminal offenders. See *Ex Parte Garland*, 4 Wall 333 (U.S. 1866) *Ex Parte Grossman*, 267 U.S. 87 (1925).

which concurrent, departmental powers lapse into penumbra. Suffice it to say that where such penumbra exist evidence of the preeminence of a particular branch must be sought in prior practice and judicial decisions. At least one commentator has criticized the apparent intrusion into the realm of executive authority over the conduct of foreign policy brought about by the FSIA. Professor Myres McDougal has expressed doubts as to the validity of the FSIA insofar as the measure would exclude the Executive Branch from immunity cases. Professor McDougal speaking during a meeting of the American Society of International Law stated that:

. . . if our foreign affairs interests were prejudiced by a court taking jurisdiction of a case any rational President would suggest immunity and any rational court would listen, despite the bill, because Congress cannot affect the President's inherent power over foreign affairs.²⁰⁷

This conclusion is in no way altered by the fact that the Departments of State and Justice supported the legislation. What effect this self-denying ordinance will have on potential separation of powers questions remains unclear. The court has, however, dealt with the issue of Executive Branch acquiescence in a derogation its own exclusive power. In *Myers v. U.S.*,²⁰⁸ a case dealing with the power of Congress over appointment and removal of executive officers, the Court held that the Tenure of Office Act,²⁰⁹ which made removal of certain executive officers subject to congressional approval, was an unconstitutional usurpation of Presidential authority expressly conferred upon the executive by Article II.²¹⁰ The Court further held that the executive branch's acquiescence in such curtailment of its own power was irrelevant and did not cure the taint of unconstitutionality.

A more recent case, *Zschernig v. Miller*,²¹¹ involved the same issue of Executive Branch acquiescence in the usurpation of an

²⁰⁷ 1976 PROC. OF THE AM. SOC. OF INT'L. L. 57.

²⁰⁸ 272 U.S. 52 (1926).

²⁰⁹ 14 Stat. 487, c. 170 § 2.

²¹⁰ 272 U.S. at 164-5.

²¹¹ 389 U.S. 429 (1968) at p.

exclusive executive power, this time by a state. In that case, the courts of Oregon, applying a state statute, had denied an inheritance of personalty to a resident of East Germany because he could not establish that he would enjoy the inheritance without confiscation by the East German government. The Solicitor General of the United States had informed the court that the State Department had no objections to the holding as it would have little or no effect on foreign affairs. The concurring opinion of Justices Stewart and Brennan discounted the fact that the State Department was willing to adhere to the judgment of a state court in the field of foreign relations:

Our system of government is such that the interest of the cities, counties, and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.

The Solicitor General, as *amicus curiae*, says that the Government does not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interfere with the United States' conduct of foreign relations." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department.²¹²

The implication is clear; no amount of executive self-denial will overcome an impermissible exercise of authority or infringement on the ordering of our constitutional system.

The FSIA presents several potential constitutional problems. It infringes upon areas traditionally viewed as within the exclusive province of the Executive Branch. Furthermore it comes at a time when the courts are beginning to carve out for themselves workable contours of restrictive immunity. Ironically the FSIA, while purporting to give the courts sole authority to pass on the validity of immunity claims, actually directs their decisions. This is particularly true with respect to the

²¹² *Id.* at 442-443.

provision of section 1605 which directs courts to deny immunity where property taken in violation of international law is present within a court's jurisdiction. However, it is the Congress's own particular view of what international law requires, rather than an independent judicial determination which is mandated by the FSIA. At the very least, the legislation amounts to an unnecessary tampering with the appropriate alignment of powers under the Constitution, an alignment which up until now has operated with remarkable efficiency.

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